SUPREME COURT OF APPEALS OF VIRGINIA.

LYNCHBURG COTTON MILLS *v.* TRAVELERS' INS. CO.

In the case of the Lynchburg Cotton Mill *v.* Travelers' Ins. Co., reported in the May number of the VIRGINIA LAW REGISTER, p. 18, a petition for rehearing is pending, based on the ground that the issue was necessarily the truth, not the sufficiency in law, or the defendant's rejoinder.

FRATERNITIES ACCIDENT ORDER *v.* ARMSTRONG.

March 14, 1907.

[56 S. E. 565.]

Insurance—Mutual Benefit Insurance—Statutory Provisions.—Code 1904, § 3252, provides that in an action on an insurance policy no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid defense, unless such condition or provision is printed in type as large as or larger than that commonly known as "long primer" type, or is written with pen and ink in or on the policy. Held, that the statute is not applicable to conditions in the by-laws of a mutual benefit society, which are by the terms of the certificate made a part of the contract.

Error to Law and Chancery Court of City of Norfolk.

Action by Sarah Armstrong against the Fraternities Accident Order. Judgment in favor of plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

Braxton & Williams, for plaintiff in error.
Wolcott & Wolcott, for defendant in error.

BUCHANAN, J. Sarah Armstrong instituted her action of assumpsit against Fraternities Accident Order, a corporation chartered under the laws of the state of Pennsylvania, to recover a sum not exceeding $5,000, which she claimed was due her on a certificate of membership issued to her husband, John D. Armstrong, deceased, as a member of the defendant order, for her benefit.

The certificate of membership, so far as it is material to the questions involved in this writ of error, is as follows: "This certificate of membership in the Fraternities Accident Order is issued to John D. Armstrong, of Norfolk, Va., upon condition that the statements and representations made by him in the ap-

plication for membership which is filed in the general secretary's office are true, and that the said application and the laws of the order as now in force, or as hereafter enacted by the Grand Council, be made a part of this contract, and upon condition that the said member complies in the future with the laws, rules, and regulations now governing the Grand Council and its funds, or that may hereafter be enacted by the Grand Council to govern said council and funds. The Fraternities Accident Order hereby constitutes him a fifth rate member, and promises to pay out of the benefit fund of the accident department to Sarah Arms rong, wife, a sum not exceeding five thousand dollars, in accordance with and under the provisions of the laws governing said order and fund, upon satisfactory evidence of the death of said member through external, violent and accidental means, within the intent and meaning of the laws of this order. * * *"

John D. Armstrong lost his life by accidental drowning, as is alleged.

The defendant company tendered 13 special pleas, all of which were accepted by the court, except special plea No. 1, which was rejected. The action of the court in rejecting special plea No. 1 is assigned as error.

This plea, we think, was properly rejected. It merely avers the manner in which, and the fund out of which, the plaintiff was entitled to be paid under the by-laws, rules, and usages of the defendant order, but sets up no legal defense, as the court held, to the plaintiff's action.

Upon the trial of the cause the defendant offered to read in evidence the application of John D. Armstrong for membership in the defendant company, and a duly certified copy of its by-laws in force at the time of Armstrong's death. Upon objection, the court excluded clause 10 of the application for membership and certain by-laws, upon the ground that clause 10 of the application and the copy of the by-laws offered in evidence were not printed (as is admitted) in type as large as long primer, and were therefore not admissible in evidence under the provisions of section 3252 of the Code of 1904. This action of the court is assigned as error.

The contention of the defendant is that section 3252 of the Code of 1904 does not apply to the by-laws of a mutual benefit society, such as is the defendant, and especially not to a mere copy of such by-laws.

Section 3252 provides that "in any action against an insurance company or other insurer founded on a policy of insurance issued after the first day of January, eighteen hundred and seventy-eight, no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid de-

fense to such action, unless it appears that such condition or restrictive provision is printed in type as large as or larger than that commonly known as 'long primer' type, or is written with pen and ink in or on the policy."

We do not think the statute quoted has any application to the "conditions" or "restrictive provisions" contained in the by-laws of a mutual benefit society like the defendant company. The object of the defendant company, as provided in its charter and declared in its by-laws, "is to unite fraternally white persons between the ages of eighteen and sixty years of good moral character and sound bodily health for beneficial protection, fraternal and social purposes, and for the payment of benefits in case of death or disability of its members." These benefits can only be secured by becoming a member of the society or order. A person who becomes a member of such a society or order must acquaint himself with its by-laws; for they, to the extent of their provisions, measure his duties, his rights, and his liabilities. He is chargeable with knowledge of the general nature and character of the organization which he is joining, and of its rules and regulations. See Niblack on Ben. Soc. §§ 17, 18, 24; Building, etc., Ass'n *v.* Snyder, 98 Va. 710, 717, 718, 37 S. E. 298; People's, etc., Ass'n *v.* Tinsley, 96 Va. 322, 31 S. E. 508; Campbell *v.* Eastern, etc., Ass'n, 98 Va. 729, 37 S. E. 350. The members of such a corporation being bound by the provisions of its by-laws, such by-laws enter into and form a part of the contract as between the member and the company, whether formally incorporated into the contract or not. 22 Cyc. 1411; Niblack on Ben. Soc. § 136.

The certificate of membership sued on, and upon which the plaintiff bases her right to recover, makes the by-laws of the defendant order a part of the contract between it and the member. Without looking to the by-laws, the rights and duties of the parties to the certificate of membership cannot be ascertained.

"An ordinary life insurance policy," says Niblack, "contains the whole contract of insurance, but the certificate of membership in a mutual benefit society is only a part of the written evidence of the contract. In such a society the charter, constitution, and by-laws in force at the time of the admission of the member are terms of an executory contract to which he assents when he enters it, and are therefore a part of the contract of insurance, whether they are referred to in the certificate of membership or not." Niblack on Ben. Soc. § 136.

To hold that section 3252 of the Code of 1904 applied to the by-laws of a mutual benefit society like the defendant would make that section in conflict with the well-settled rule of law that in such societies the by-laws are a part of the contract of insurance.

It would not only produce this conflict, but would make that section apply to cases where the evil intended to be remedied by it did not exist. The object of that section was to require the "conditions" and "restrictive provisions" mentioned therein to be so plainly inserted as not to escape the observation of the insured when entering into a contract of insurance. Cline *v.* Western Ass'n Soc., 101 Va. 503, 504, 44 S. E. 700. It was not intended to require that the by-laws of a mutual benefit society should be printed in a particular manner to prevent those who became members of the society from overlooking their provisions, since the law conclusively presumes that those who become members of such a society have acquainted themselves with its by-laws.

Whether the court erred in excluding from the jury clause 10 of the application of John D. Armstrong for membership need not be considered, as that provision in the application is substantially the same as is contained in the by-laws, which, as we have seen, are admissible in evidence, and of which the member is presumed to have knowledge.

The action of the court in refusing to give instructions numbered 1, 2, and 3, asked for by the defendant, is assigned as error.

The court having refused to admit in evidence the by-laws upon which the pleas mentioned in the said instructions were based, there was no evidence upon which the jury could have found in favor of the defendant on any of the pleas mentioned in the instructions. The error which the court committed was not in refusing to give the instructions in the then condition of the evidence, but in excluding from the jury the by-laws of the defendant upon which the pleas mentioned in the instructions were based.

The judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded to the trial court for further proceedings to be had not in conflict with the views expressed in this opinion.

Note.

The Iowa Code provides in one section that every company formed for the purpose of insuring the lives of individuals shall, before issuing policies on lives within the state, comply with the conditions and restrictions prescribed by the statute; further, that all stock companies shall be restricted as to capital stock; further that companies organized upon the mutual plan, shall, before issuing policies, have actual applications on at least a certain number of lives, etc. It was held, that mutual aid associations were not subject to these restrictions imposed upon stock and mutual companies. State *v.* Iowa Mutual Aid Association, 59 Iowa 125, 12 N. W. 786.

The Connecticut Mutual Benefit Company, chartered in Con-

necticut, was held to be an insurance company within the meaning of the Massachusetts statute providing that no officer, agent or subagent of any insurance company, not incorporated in this commonwealth, shall do business, without first procuring from the insurance commissioner a certificate of authority, etc. Com. *v.* Weatherbee, 105 Mass. 149.

It was held, in a New York case, that where the object of an association is for the relief of its sick and unemployed members, and the payment of benefits upon the old age, disability, or death of such persons, it is not an insurance company. Supreme Counsel *v.* Fairman, 62 How. (Pr.) New York Supreme Court 386.

NORFOLK & W. RY. CO. *v.* CARR.

Jan. 31, 1907.

[56 S. E. 276.]

1. Railroads—Injury to Person on Track—Instructions.—In an action for injury to a child, a licensee on defendant's railroad track, the evidence showed that defendant's employees in charge of the train did not see the child, which failure to see was charged as negligence. The court instructed that if the locus in quo had been in daily use as a crossway for a long time by a large number of persons, and its use was well known to defendant, it was its duty to use reasonable care to discover the child, and if it did not do so, and its failure caused the accident, they must find for plaintiff, though the child was guilty of contributory negligence, provided servants did not do all they could to avoid the injury after the danger was known, or might have been discovered by ordinary care. Held, that the instruction was not subject to the objection that it presumed that the child was seen by those operating the locomotive.

2. Trial—Instructions—Application to Facts.—Where the evidence showed that those in charge of defendant's engine did not see a child struck by the engine until the accident occurred, an instruction that, "if you believe that those in charge of and operating the said train saw the child on the track, etc., was properly refused, as assuming facts of which there was no evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-602.]

3. Witnesses—Cross-Examination—Collateral Issues.—Where the next friend of an infant bringing a suit was a witness, the question asked him on cross-examination, as to whether he did not tell another witness that, if she would testify for him, he would see that she got paid, was collateral to the issue, and calculated to divert the jury from the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50. Witnesses, §§ 955-957.]